I recommend that the Obligatory essay prepared under my supervision by Paul Gladson Katupisha

Entitled THE IMPACT OF DEATH DURING A SUBSISTING MARRIAGE SEPARATION – A CRITIQUE OF BOTH ZAMBIAN CUSTOMARY LAW AND STATUTORY LAW

be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements relating to format as laid down in the regulations governing Obligatory essays.

Dr. M. Munalula
(Supervisor)

Date 2003
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Dr. M. Munalula (Supervisor)
DEDICATION

To my wife Agnes for her fondest love and inspiration during my long stay away from home and for her unceasing intercession to God for my successful completion of my LLB degree programme, for her wise counsel at the time we were agonising with the decision of abandoning my soldiering career with the army to embark on legal studies, her financial support to the family in my jobless moment.

"Who can find a virtuous woman, for her price is far above rubies. She looketh well to the ways of her house hold, and eateth not the bread of idleness. Her children rise up and call her blessed; her husband also, and he praiseth her. Many daughters have done virtuously, but thou excellest them all". (proverbs 31:10,27, 28:29)
ACKNOWLEDGEMENT

I wish to express my sincere gratitude to the following people:

My wife Agnes for her great understanding and support during my long stay at UNZA. It was not easy given the fact that the period of study was characterised by unprecedented closures that created uncertainty in our minds as to when exactly we would finish. She had to support the family single handedly as I had left employment to pursue the studies.

My children Tabila, Emmah and Lukumo for their patience when ever their needs were not met knowing too well that dad was out of employment.

My mother who is a great inspiration to me for her hard work even in old age. When she heard that I was unwell, she had to find someone to bring her to Lusaka to see me.

My late friend and brother Gershom Lonely Simumba (Major) for encouraging me to take up legal studies even when it seemed impossible to move from a combination of Geography and Education. I still hear his voice even now: (Ba Elder you can make it, all things are possible to him who believes) may his soul rest in peace.

My pastor, Bishop Mark Musonda for the prayers answered.

I would like to sincerely acknowledge the role my Supervisor Dr. M. Munalula played in this research. She readily took me in after my first supervisor left the country. She took up her valuable time for me during the school recess to offer guidance, advise and criticism of the work.
Her sentence by sentence check of the work gave me a challenge to work even harder. She set challenging targets for me that seemed unattainable and I worked at a pace that emboldened the impression that I had to jack up or else…; and this yielded good results that everything worked in my favour. Hats off mama.

I am indebted to Mr. Stanley Nshindano, the local courts officer for taking time off to search for the local court cases for me. I also acknowledge Ms. Agatha Chipango who agreed to work over time to have this research typed and completed on time. My gratitude to all my Christian brothers and sisters who continued to stand with me in prayer, only God can reward them. I owe a lot to my nephews, Kepson, Brighton and Stanley who took up some roles at home to ensure all was well.
ABSTRACT

Some of the aspects of the Intestate Succession Act which are the concern of this dissertation include the following, i.e;

♦ Provisions relating to distribution of estate.
♦ Provisions relating to distribution where the intestate is survived by a spouse etc-
♦ Provisions relating to a surviving spouse or child or both, entitling them to the house.
♦ Provisions relating to devolution of home stead and common property in polygamous marriages.
♦ Provisions relating to small estates.
♦ Provision relating to traditional cleansing.
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Chapter One

1.1 Introduction

This paper looks at the impact of death during a subsisting marriage separation and is critique on both Zambian customary law and statutory law. It will further seek to draw attention to the fundamental problems which frequently occur in disputed marriage matters and to draw attention to the various possible ways in which these problems may be solved. Unusual or special features of the Zambian legal systems are referred to, but a detailed exposition of the problems in a marriage separation arising from the death of a spouse are to be found in the succeeding chapters.

1.2 PROBLEM STATEMENT

The problem emanates from the fact that the two spouses had gone through a bad patch and decided that they should live apart thus reconciliation is unforeseeable. McGregor puts it correctly that, “separation provides a presumption that the marriage has irretrievably broken down and so results in divorce. So far as reconciliation is concerned, we do not believe that parties who have gone through the forensic mill are likely to become reconciled, but if that is their wish, the order of the court is hardly likely to provide a stumbling block”¹. This is as far as the two parties are alive. But if one of the parties to the marriage is deceased, I find it hard to see how the court or any member of the family can attempt to reconcile them and hence the need for this research to find a way forward. Matrimonial law, moreover is *sui generis* because it deals essentially with the intimate relations and common experiences of two persons who live with each other as man and wife.

No other branch of law deals in such a way with the interweaving of characters, the conflict of wills and the general wear and tear of daily life; in no other branch of law are everyday activities so intimately involved and nowhere is it so dangerous to seize upon one fact without placing it in the context of the married life as a whole\(^2\). So to separate the events that led to a marriage separation from the events that characterize the death of one spouse is to suggest that all was well during the married life of a couple and yet that was not the case. Such a situation is well demonstrated by Wilde J. O., in Scott v Scott\(^3\).

“In the great variety of questions which in this country are referred to a jury, there are few so difficult to handle as the contentions of an unhappy marriage”.

How then does it appear feasible to reconcile the dead and living who, during their life time were at odds against each other? This is to be seen at the conclusion of this research. However, recent legislation in Zambia, The Intestate Succession Act, of 1989 has generally focused attention on the distribution of property among the beneficiaries but, has not attempted to provide for dispute resolution in instances of death during a subsisting marriage separation.

Problems often come from two areas i.e. cleansing and property settlement. The law has settled the problem of property settlement only as far as there was a subsisting valid marriage contract whether or not the couple was living together. As long as the two never divorced the surviving spouse is regarded as a widow or widower.

\(^2\) John M. Biggs, The Concept of matrimonial cruelty, 3 (1962)
\(^3\) [1863] 3 S & Tr 319 at 320
But the problem usually comes to a large extent from a question of cleansing. The family of a deceased spouse would often capitalize on this aspect especially so, if the separation dispute adversely affected them.

It is this factor that spills over to property settlement where they would not want to give the widow or widower the share of family chattels. The bitterness is usually compounded by the suffering such a family may have gone through without the presence or help from the other spouse during the illness of the deceased.

The widow or widower then would want to seek justice from the courts or victim support units and in some instances from women’s organizations such as Young Women Christian Association (YWCA).

The question then arises as to whether the law is adequately provided, to deal with these matters. Worse still are instances where such marriages were under customary law where a marriage certificate is not necessarily an issue. In statutory marriage a surviving spouse would often produce the marriage certificate as proof of a valid marriage and the courts have often relied on that fact and yet the anger and hatred still rages on to unbearable degree.

Another concern for this paper is the thin line that exists between divorce and separation in customary marriages. Most of the Zambian marriage separations are not by court order. The parties merely part after a bitter stay together. In English law, as is the law of many countries, it is not considered as being contrary to public policy for a husband and wife whose marriage has broken up to enter into an agreement for their immediate separation. An agreement of this kind may be oral or even inferred from the spouses’ conduct.
Very often however, it will be the desire of the spouses concerned to achieve more than the mere mutual release of the duty to cohabit and to cover such matters as maintenance of wife and children; custody of, and access to the children; and the division between the spouses of the furniture and the matrimonial home itself.

In this invent a written agreement will usually be entered into, each spouse being independently legally advised. By tradition these agreements are often embodied in a deed4. This procedure is often ignored by most men in this country. The rationale to this shall be discussed in the succeeding chapters. However, Judge H. B. Grant gives us the reason for a marriage separation agreement. He says that, “the essence of a separation agreement is a couple’s mutual consent to living apart and their reciprocal release from their duty to cohabit. Its main practical purpose is to provide for maintenance of the wife and children and amicably to solve all other questions between them like for example, the division of property, custody and access”5. He further says that, agreements for an immediate separation have been lawful and binding since the decision of the House of Lords in Wilson’s case in 18486. This procedure if followed, perhaps would solve many problems that will be alluded to in this paper.

The problem today in Zambia is that many people in their varying tribal settings, educated and uneducated, are still caught up in the mystery of death. They all carry on their normal day to day activities as though heaven and earth have passed away. Unfortunately, even the so called educated and civilized people have found themselves in courts, victim support units at Police stations and other women’s organizations like Young Women’s Christian Association for offences ranging from property grabbing to mistreatment of surviving spouse.

6. Ibid
Although the Intestate Succession Act, 1989 has been applied in such cases, only rightly so to the obvious provisions, whilst this particular problem of death during a subsisting marriage separation has often been misapplied to wrong sections not particularly connected with it.

A couple having gone through a bad patch in their marriage decide to separate to give themselves a relief and go on with life like that, for unnecessarily too long a period of time. In the process one spouse dies, according to the current law, that is a valid subsisting marriage and the surviving spouse is a widow or widower which ever is the case.

But whether or not such a widow or widower could be accepted by the bereaved family, is an issue. On the other hand the surviving spouse would want to claim the status of widow or widower and consequently claim the rights that accompany such a status like cleansing and inheritance to property. But the in-laws’ family would want to dispute that, claiming that their relative had suffered so much under such a marriage and the separation saved as a divorce. Hence no claim should be attached to the property or traditional ritual of cleansing.

This then becomes not only a social problem but a legal problem also and therefore requires attention by the legal system of this country. This is the purpose of this research, to explore into the extent of this problem and suggest recommendations to the existing laws.
1.3 Methodology

Information in this paper was gathered from various sources. These include the following:

- Case studies from the local courts
- Victim Support Units at Police Stations
- Women Organizations like; YWCA (Young Women Christian Association)
- Interviews with victims and families of deceased spouses
- Notable customary law experts
- Law Development Commission
- Existing literature on the subject of marriage
- Zambian statutes

1.4 Chapter outline

Chapter one introduces the essay and outlines the Methodology used in the research.

Chapter two examines briefly the following:

The nature of marriage specifically and in general terms, the definition as advanced by earlier scholars, and the two types of marriage systems in Zambia.

Chapter three looks at the legal effects of a marriage separation under the following subheadings:

(a) Judicial separation
(b) Non judicial separation
(c) Traditional perception of separation, a Zambian customary law approach.
Chapter four explores the effects death has on the two surviving families vis-à-vis the surviving spouse and children. It also looks at the role of stepchildren in such marriages in the event of such death.

Chapter five covers the conclusion in which recommendations are made and concluding remarks on the impact of death during a subsisting marriage separation and how inadequate the current law is on the subject.
Chapter Two

Nature and Definition of Marriage

2.1 Introduction

This chapter looks at the nature of marriage specifically and in general terms. There is a brief examination of western marriages while the bulk of the chapter looks at the nature of marriage generally.

This chapter also looks at the definition of marriage as advanced by the earlier scholars of marriage. There is also an examination of the two types of marriage systems in Zambia.

2.2 The Nature of Marriage

Marriage is a social institution upon which society depends most intimately. This cell, as it were of the social organism is necessary for both the existence and the well being of the human race. But the satisfactory fulfillment of its purposes depends upon its inherent integration, or in other words, upon its homogeneity and stability. This is why every marriage is a union of not only a man and woman as we shall see later but, a union of two families. Although this may not be the case today. There is usually a sense of belonging. For instance, if a Kaonde man marries a Lozi woman, or vice-versa a union is not only between these two individuals but between the two families, the Kaonde family and Lozi family.

1. E. Schmiedeler, An Introductory study of the family 3 (1930)
Jack Dominian\(^2\) gives the nature of marriage in Western societies as has been considered throughout the centuries as a "solemn, life-long contract between a man and a woman, conferring mutual rights and obligations in their sexual, material and social life". What this entails is that it should not be terminated by any one at all. But this is not to say that it will be all roses.

Marriage relationship between the spouses themselves and their children if any, is subject to the constant fluctuations of physical and mental health as well as a variety of social pressures. It is for this reason that marriage, as a complex institution is bound to experience friction, and sometimes discontent as part of its very existence. After all this is a union of two complete different personalities from different backgrounds trying to lead one life.

As one spouse undergoes physiological changes, so do the different pressures and expectations and this is usually at different rates. It is after all a well known fact that women mature at a faster rate than men and so to their expectations. In addition, the comprehensive changes in the status of a woman could result only in some change in a man's position and authority. The whole new situation as a matter of fact, gives rise to a great number of conflicting claims in the home on the part of husbands and wives. Even where both are genuinely eager to amicably adjust differences that arise, a lack of well-established standards to meet the new situation proves in some instances a very real barrier to suitable adjustment\(^3\).

\(^2\) J. Dominian, marital breakdown 15 (1968)
\(^3\) E. Schmiedeler, an introductory study of the family 160 (1930)
Undoubtedly many of the differences that arise between husband and wife in the home today grow out of divergent attitudes regarding one another's position in the home. In any case, whatever form marriage takes, it was meant to last a lifetime of the two individuals. This assertion can also be traced in biblical marriages where it is recorded in Genesis 2 verse 24 that “... a man shall leave his father and mother and be joined to his wife and they shall become one flesh,” and in Matthew 19 verse 6, it is reiterated that, “so then, they are no longer two but one flesh. Therefore what God has joined together, let not man separate”.

This means that only death can successfully terminate the union of marriage although it is also acknowledged in the same book of Matthew, that marital unfaithfulness could be a ground for the termination of marriage. But such termination according to Morton Hunt may not be absolute.

He says, “Divorce, though it cancels the partnership of man and wife, never severs the relationship entirely. When two people have once been so joined, it is little wonder they are never fully separated afterwards. The experiences of marriage have created a million microscopic electrical contacts in the brain and though the judge’s signature on a piece of paper can undo that multitude of connections; many of them indeed will endure until the current itself is turned off”. And this is through death. Marriage for this purpose becomes a life long agreement that both man and woman enter into thereby creating certain legal relationships with each other and each other’s relatives.

4. Schmiedeler supra at p 160
5. Old King James version – Matthew 19 v 6
Such a legal relationship imposes on the two persons, rights and duties. Hence, marriage takes the nature of a contract though it is quite different from a commercial contract. During the subsistence of such a contract, chances are that the two may go through a bad patch so much so that the couple may be released from the duty to cohabit. In the process relatives of these two persons may be affected and as they feel part and parcel of such a marriage, will usually come in to either try and resolve the differences or sever the relationship altogether.

This is particularly true in Zambian customary marriages. So the nature of marriage in a Zambian customary system is not only between two contracting parties but, between two families of the wife and husband. One can only take an example where a sister of the husband visits the home. She will always feel and act with authority in such a home despite the presence of a wife because the impression is that she has a right to be there, and can make influential decisions even to the detriment of the sister in-law and the marriage. She can not be said by the society in which they live as not being privy to that contract of marriage.

2.3 **Definition of Marriage**

The widely accepted definition of marriage is that enunciated by Lord Penzance in *Hyde v Hyde*\(^7\), he said,

\[
\text{"I conceive that marriage as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others".}
\]

---

7. (1866) L R I P & D 130, 133
Few elements in this statement need isolation.

(a) Voluntary – according to Oxford Advanced learners’ dictionary, it means, that done willingly, not because you are forced. Therefore for a valid marriage to subsist, there must be voluntary willingness of a man and a woman to marry. This excludes situations where parents or other relatives arrange a marriage for you by identifying a girl in their community who they think is suitable. The voluntary nature of marriage means that a man should identify his would be wife with his independent mind free from outside interference or influence and vice versa.

(b) For life – This means that this marriage shall subsist during the life time of either of the two. Should one spouse die the marriage ceases to exist.

(c) One man and one woman entails a monogamous marriage. Any other person is excluded. This means that polygamy is forbidden. This definition finds no place in most African customary marriages, as they are said to be potentially polygamous. A customary marriage is the association of a man and a woman in conjugal relationship according to the applicable Zambian Customary Law.

You notice that in this definition, there is no voluntary union but association. Marriage thus provides a framework for the attainment of wider objectives which go beyond the immediate concerns of the parties.

10. Ibid at p 60
A customary marriage therefore may be monogamous or as stated earlier polygamous. Polygamy however is only available to a man as he finds no legal impediment in contracting another marriage. In customary marriage unlike marriage under the statute requires no documentation. A marriage subsists for a long time without any requirement of a marriage certificate. In case of marriage separation the couple merely part with no one claiming any rights except those provided for in the customary law of the given tribe. In marriages under the Act, there is a requirement to be issued with a marriage certificate as proof of a valid marriage and is usually issued by the Registrar of Marriages or a minister of the denomination\textsuperscript{11} and divorce is by court order.

2.4 Two Types of Marriage Systems in Zambia

It is a well known fact that Zambia is a multi-racial, multi-cultural and multi-religious society with varying marriage systems like Moslem marriages, Hindu marriages etc. For the purpose of this research I have confined myself to the study of the two major marriage systems i.e. customary and statutory marriages. The rationale is that these two systems apply to the majority of the multi-racial and cultural groups of our society.

\textsuperscript{11} C. Murray, Families divided, 119 (1981)
Customary Marriage:

Murray\textsuperscript{12} made a general survey of African marriage law and pointed out that, "The marriage transaction is normally a long-drawn out process and there is often some doubt, both as to the exact point in that process at which the parties become husband and wife, and also as to which (if any) of the accompanying ceremonies and observances are strictly essential to the conclusion of a valid marriage".

This observation is also true for the customary marriage in Zambia. A research made by women and Law in Southern Africa is a good reference point\textsuperscript{13}. There, it is pointed out that, "marriage determines whether one can be classified as a widow or a widower upon the death of a spouse". For a union to be recognised as a marriage, a variety of pre-marriage procedures and in-marriage expectations have to be met. The variety of procedures are ethnic group specific and depend on whether one belongs to a matrilineal or patrilineal group.

It is difficult to state categorically what formalities are necessary for the conclusion of a customary marriage. This puts women in a precarious position because the existence of a marriage can be denied if one party was unhappy about something. This is worse if the couple was on separation.

\textsuperscript{12} Women and Law in Southern Africa supra at p 102
\textsuperscript{13} Subordinate Court Act
These customary marriages are recognised by the Zambian Law because customary law is recognised as being applicable to the country by virtue of Section 16 of the Subordinate Courts Act\textsuperscript{14}, provided such customary law is not repugnant to justice, equity or good conscience and is not incompatible, either in terms or by necessary implication, with any written law in force in Zambia. It is also impliedly recognized by the local courts Act\textsuperscript{15}. It is actually stated in Section 6 of the Act\textsuperscript{16} that, “subject to the provision of this Act, a local court shall administer the African customary law applicable to any matter before it so far as such law is not repugnant to natural justice or morality or incompatible with the provision of any written law”.

The real problems that are faced by couples whose marriages are governed by custom is that there are usually no documents although in recent times marriage certificates are issued in the District Registry, but only to the extent that they could assist those in employment obtain certain benefits of marriage from their employers. They are issued to all who go through the court process.

As I said earlier customary marriage is ethnic specific. As such it is very difficult to have uniform application in Zambia. This brings a lot of problems in times of disputes especially inter-tribal marriages. Take for example a Kaonde man from a matrilineal group who marries a Ngoni woman from patrilineal group, it will be very difficult to find a law suitable in the administration of the children’s benefits or widow or widower’s benefits.

\textsuperscript{14} Local Court Act Cap
\textsuperscript{15} Ibid
\textsuperscript{16} Muna Ndulo (ed) Law in Zambia, 143 (1984)
As Ndulo\textsuperscript{17} said, "there is nothing like a customary marriage law prescribed for the whole of Zambia. There are as a matter of fact as many customary laws in Zambia as there are tribes, save for some few commonalities. It is also an established truth that customary law marriage establishes a relationship between a man and a woman, regulates their sexual activities, locates their children in the kinship system and influences the inheritance of their property\textsuperscript{18}.

A customary marriage is a union of a man who may or may not be married and a woman who must be unmarried at the time of entering into marriage\textsuperscript{19}. This is how a customary marriage is potentially polygamous. It allows a man to have a plurality of wives and not a woman. In all his marriages, a man is required to meet some necessary conditions like:

(a) Consent of the woman’s competent relatives and his own relatives

(b) The parties themselves must consent to the marriage

(c) There must be payment of the bride price. This varies from tribe to tribe

(d) The girl must have attained puberty. Age in a customary marriage is not a factor. As long as the girl is biologically mature that settles the matter.

There are two ways in which a customary marriage could be dissolved. It can either be at a family fora or at a local court\textsuperscript{20}. Some reasons for dissolving a customary marriage could be quite trivial. For example a marriage could be dissolved if a woman is lazy, does not respect the in-laws or she is barren.

\textsuperscript{17} Ibid at p 146
\textsuperscript{18} Ibid at p 147
\textsuperscript{19} WLSA supra at p 62
\textsuperscript{20} Ibid
Barrenness was always attributed to a wife. It is also believed that it is only a husband who can divorce a wife, although in some cases a wife could leave the husband if she is neglected. Separation is not usually pronounced because a husband can easily go back and reconcile with his wife. Whenever a true divorce has occurred, the woman’s family may pay back the bride price. This happens in most Zambian tribes.

Statutory Marriage

As indicated earlier, Zambia has a dual system of laws i.e. Customary Law and Common law. As a result, two types of marriage laws apply in Zambia leading to two types of marriages which are customary marriage and statutory marriage. According to Ndulo, “most of the statutory law of marriage is composed of “received” law, which in view of the colonial history, is in effect English law”.

The English law of marriage applies to Zambia by virtue of Section 11 of the High Court Act. In its preamble, the Marriage Act states that it is, “An Act to provide for the solemnisation of marriages; to provide for the validation of marriages already solemnised; and to provide for matters incidental to or connected with the foregoing”. The rationale for the enactment of a Zambian Marriage Act is to modify English law which was made applicable to the country to suit local conditions and also to set up the administrative machinery necessary to administer marriage laws, such as the delimitation of districts, the appointment of registrars of marriage and the detailing of marriage ceremony procedures.

22. Ibid
23. Ibid p 143
24. Marriage Act Cap 50 of the Laws of Zambia
25. Ibid
26. Ibid section 6
The procedure to contract a marriage under the Act is quite different from the one followed in customary marriage. Under the Act\(^27\), Section 6 requires that one of the parties give notice of intention to the registrar of the district in which the marriage is intended to take place not less than twenty one days before the date of solemnisation. The marriage should take place within three months after the date of notice. If the marriage does not take place within three months then the notice and all proceedings consequent there upon shall be void\(^28\). The Registrar shall issue a marriage certificate upon being satisfied by affidavit and upon payment of a prescribed fee\(^29\). There are many other requirements to a valid statutory marriage. For example;

(a) One of the parties should have been resident within that district for at least fifteen days.

(b) The parties should not be less than twenty- one years old. Where one of the parties is less than twenty one years, written consent from one of the parents or guardian should be annexed to the affidavits.

(c) There should not be any impediment whatsoever to the marriage

(d) None of the parties is married by African customary laws\(^30\)

Essentially, the marriage certificate is issued as evidence of the marriage\(^31\). Unlike the marriage under customary law, marriage under the Act between persons either of whom is under the age of sixteen years is void\(^32\). The High Court has jurisdiction for the determination of disputes of marriages under the Act. The court insists that the provisions of the Marriage Act regarding the requirement for prior reconciliation before divorce be applied strictly\(^33\).

\(^{27}\) Ibid section 32 (b)

\(^{28}\) Ibid section 31

\(^{30}\) Ibid section 33

\(^{33}\) Ibid supra note 12 at p 58
The court can also order a judicial separation order. It appears however that most of the people in Zambia who have contracted their marriages under the act are ignorant of these provisions and hence the many difficulties that couples go through and end up in separation without court orders. A cross section of people talked to seem not to be aware of a judicial separation and its advantages. This causes a lot of misery in case of death as most relatives do not appreciate that a widow or widower has any right as we shall see in the next chapter.

There are also other advantages for getting married under the marriage Act.

1. It is a monogamous marriage

2. During marriage, on separation and after divorce, a woman can claim maintenance whereas under customary law maintenance can only be claimed after divorce.

3. Upon divorce a woman can claim a share from the marital property whereas under customary law whether the woman gets a share or not depends on the customary law applicable. In Chibwe v Chibwe\textsuperscript{34}. The Supreme Court however had to make a landmark decision in awarding the wife a substantial amount upon divorce, despite the Ushi customary law being followed by the local court.

A research by women and law in Southern Africa\textsuperscript{35} however, made the following observation: “The advantage of marrying under statutory law are there on paper.”

\textsuperscript{34} SCZ Judgment No. 38 2000
\textsuperscript{35} Ibid supra note 12 p 59
In practice a woman married under statutory law is in the same precarious position as one married under customary law. Thus, whereas marriage under the Act is monogamous, Zambian men have been found to have second and even third wives despite marrying their first wife under the Marriage Act.

There are a lot of impediments in accessing the law, for example, cultural expectations which do not expect a woman to challenge her husband, hence she can not take him to court. There are however exceptions under the law of evidence.

Worse is the scenario where the two were on separation and one of them dies. Often times the recognition of widow or widower may be removed. This is not to say that some widows or widowers do not take advantage of a death situation to exploit the deceased’s family by extorting from them property that may have been acquired during the marriage separation by using the marriage certificate as a shield. The law is very silent on property acquired during marriage separation where the two had even shared the property of their marriage on separation. This is notwithstanding the fact that some property rights subsist on either party.
CHAPTER THREE

EFFECTS OF SEPARATION

3.1 Introduction

This chapter looks at the legal effects of a marriage separation under three main heads viz, judicial separation, non-judicial separation and traditional perception of separation, a Zambian customary law approach.

3.2.1 Judicial Separation

The court has jurisdiction to entertain a suit for judicial separation in Zambia as provided for in the matrimonial causes Act section 17\(^1\).

"17 (i) A petition for judicial separation may be presented to the court by either party to a marriage on the ground that any such fact as is mentioned in section 1 (2) exists, and the provisions of section 2 shall apply accordingly for the purposes of a petition for judicial separation alleging any such fact, as they apply in relation to a petition for divorce alleging that fact".

The facts referred to in section 1 (2) are:

(a) That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) That the respondent has behaved in such a way that the petitioner can not reasonably be expected to live with the respondent;

(c) That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

\(^1\) Matrimonial causes Act 1973 CAP 18
(d) That the parties to the marriage have lived apart for a continuous period of at least two years immediately proceeding the presentation of the petition (hereafter in this Act referred to as "two years separation," ) and the respondent consents to a decree being granted;

(e) That the parties to the marriage have lived apart for a continuous period of at least five years immediately proceeding the presentation of the petition (hereafter in this Act referred to as "five years’ separation").

The provisions of section 2 of the matrimonial causes Act ² are quite elaborate as they concern both divorce and judicial separation and for this purpose it would not be prudent to reproduce them. But it should be noted that they try to state on how they apply to each fact in section 1 (2) (a) (b) (c) (d) and (e) above.

It is also a requirement by the court on a petition for judicial separation to inquire as much as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent, although in the same vein the court may not concern itself in considering whether the marriage has broken down irretrievably or not³. If it is satisfied on the evidence of any such fact stated above, it shall, subject to section 41, grant a decree of judicial separation. Section 41 of the Act gives protection to children on a decree for separation as they can be directly affected by such a separation.

2. Ibid
3. Ibid section 17 (2)
3.2.2 Effects of Judicial Separation

The decree of judicial separation effects no change of status and may in certain circumstances subsequently be discharged. It takes effect immediately it is pronounced\(^4\). Essentially, this means that the couple remains husband and wife. The separation does not affect the marital status of the two. It does not matter the cause of such a separation, the marriage is still valid. The principal effect of the decree however, is that it relieves the petitioner from the duty to cohabit with the respondent. Section 18 (1)\(^5\) provides that:

"18 (i) Where the court grants a decree of judicial separation it shall no longer be obligatory for the petitioner to cohabit with the respondent".

In the Western World where wives or women are not restricted by traditions, the provision of this Act may be invoked by a wife who has been forced by her husband to have sexual intercourse to sue as this is tantamount to rape. It was actually held in Rv Clark\(^6\) by BYRNE. J, that a husband could be guilty of rape if the wife had obtained a judicial separation or separation order in a magistrate’s court, because this relieves her of the duty of cohabiting and thus of having sexual intercourse with him. We are yet to see this right being exercised in Zambia. But for now, there are a lot of traditional prohibitions against women’s rights in this area. Some women may be aware of such a provision but fear that it would bring shame to the family for a wife to sue her husband for rape, because it is a common belief that a wife consents once and for all immediately after solemnisation of a marriage.

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5. Supra note 1
6. [1949] 2 All E.R. 448
Even where there is a divorce a husband may go to the former wife and demand sex. There is a saying in *Kikaonde* which says, ‘*Mubujimi bwakala ke mushupa kujima jikwabo ne*’ meaning that (it is not difficult to go back to your old field or garden to plough again). So, you hear of instances where a man is said to be having sexual intercourse with his separated or divorced wife. If he has remarried, his new spouse would even be jealous of the divorced wife of her husband if she hears, he is frequenting her home although he may be going there to see and provide the necessaries of life to his children.

This is why the court does not only have power to grant a decree of separation but a number of other orders relating to custody and welfare of the children of the family and to financial relief. The decree will also affect the devolution of a spouse’s property if he or she dies intestate.

The concern of this essay is the impact of death in a subsisting marriage separation. As far as judicial separation is concerned, Section 18 (2) of the Matrimonial causes Act of 1973\(^7\) is binding. Whether or not it cures the wounds caused by the impact of such a death is debatable. The law is well established that, if either spouse dies wholly or partially intestate whilst a decree of judicial separation is in force and the separation is continuing, his or her property is to devolve as though the other were dead\(^8\). The rationale is that the rules of intestate succession are intended to reflect the testamentary dispositions the deceased might reasonably be expected to have made.

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7. Ibid supra note 1
8. Ibid section 18 (2)
And as judicial separation almost always marks the *de facto* end of the marriage, it is highly unlikely that either would have left anything to the other. The presumed *de facto* end of the marriage is often perceived to be the real situation in most conflicts at funerals of such a nature and there should be placed in our statutes an express provision to that effect to cure the defect. A judicial separation as it is means that for all purposes the spouses remain husband and wife and therefore no one should be at liberty to remarry. This is highly doubted in customary marriage because of the weakness in that law which allows polygamy. The difficult we have at the moment is the enforcement of the law and the awareness of these provisions. Not many couples in this country seek judicial separation. Many may bitterly agree to live apart because they can not cope with life together. Hence, adopt a non-judicial separation.

3.3.1 **Non-Judicial separation**

The parties to a marriage may wish to live apart without seeking a decree for judicial separation. If this is their choice, then they will normally enter into a separation agreement. The essence of a separation agreement is that the husband and wife agree to live separate and apart. This means that each of them releases the other from his or her duty to cohabit. Bromley states that "an agreement will be perfectly binding as a parole contract and consequently may be entered into orally or even by conduct". Most non-judicial separations in customary law marriages do not offer any consideration. When the couple fails to live together, the most aggrieved person may decide to separate from the other without any specific period or consideration.

9. Ibid Supra note 4 at p 618
10. Ibid at p 164
11. Ibid
3.3.2 Legality of Non-Judicial Separation

When a marriage has clearly broken down and there is literally no immediate possibility of the parties’ continuing to live together in amity, it is better for all concerned and for society as a whole that they should be able to settle their differences out of court than that their matrimonial quarrels should be dragged into the open.

The legality of such separations prevailed in the House of Lords decision in Wilson v Wilson\(^\text{12}\), when they held that there was nothing *per se* illegal in an agreement for an immediate separation. English law provides for not only a simple oral agreement to live apart but, also a deed. As such there is really no standard form of agreement. For the purpose of this essay, I would not like to go into forms and terms of separation agreement in English law. My main concern is a Zambian situation which is compounded by diverse customs and traditions. It is in fact because of the very problem of diversity of customs that a law acceptable to all tribes should be arrived at.

Most of the civilised societies of Zambia today do appreciate non-judicial separation. The only problem is the family system where extended families are allowed to have a say in marriage disputes.

In case of death some of these families would not usually accept the fact that the two were on separation. The other problem is that the couples themselves do not actually agree on how the wife would be maintained during separation and on the custody of children.

\(^{12}\) [1848] I.H.L Case 538 H. L. Bromley supra note 10 p 165
The couple merely parts company in the hope that the one who was wrong would reform. The sharing of property is not usually done. The wife who usually moves out of the matrimonial home only carries her basic items like clothing. This is the reason why during death the surviving spouse and especially a widow would like to come back and claim her right to property. Depending on how the couple separated, the relatives of the deceased husband would capitalize on such weakness and try to disown the widow. The problems that characterize such property settlement are not as easy as they are put on paper. Families are usually torn apart and those that suffer most are the children. It is not just what the law says about property settlement but how the two parties shall live thereafter. There should be a law acceptable by both parties and one that should foster unity.

We are yet to see separation agreements in Zambia that will include agreement deeds so as to help the courts arrive at proper decisions when problems arising from death occur. There is great suffering by widows because when the couple decide to go on separation, the wife usually leaves all the family chattels with the husband and the relatives of the deceased would not want the widow to have access to them when the husband dies.

It remains the purpose of this essay to come up with recommendations on how such problems can be minimized.
3.3 TRADITIONAL PERCEPTION OF SEPARATION, A ZAMBIAN CUSTOMARY LAW APPROACH

There are about seventy-three ethnic groups in Zambia. Each of these ethnic groups has its own custom but, customary laws of marriage of these groups show some similarities. This research could not manage to adequately cover all the ethnic groups because of some limitations. However, efforts were made to get the information pertaining to marriage separation from some groups.

KAONDE

Mr. Kyalifungwa Moses, the Deputy Headmaster at Mukinge Basic School in Kasempa gave the views pertaining to the Kaonde ethnic group. He said that a marriage subsists as long as the husband has not surrendered his wife to her parents and expressly told them that he had divorced her. There is also a requirement that the two families sit together to try and reconcile them. If the husband refuses to take her back, the wife’s family pays back (*nsalamo*) dowry to him. This act terminates the marriage. In the absence of this procedure the marriage would be regarded as subsisting no matter how long that separation takes. In most cases the wife would be carefully watched by her relatives to ensure that she doesn’t have any extra marital affairs with other men although there is no restriction on the husband’s side. He gave a classical example of a man who was working in Kitwe. This man sent his wife to her parents in Kasempa without demanding for his *nsalamo*. After a long period of separation he married a second wife. He later divorced the second wife and consequently fell sick. He was brought to Mukinge Mission Hospital for treatment.
When the separated wife got the news that her husband was in hospital, she decided to come to the hospital and from time to time nursed him. Her relatives tried to restrain her from nursing him but to no avail. When he finally died, she decided to accompany the body for burial in Mpungu west of Kasempa. After burial, she demanded to be cleansed claiming that she was a widow. The deceased’s family agreed to cleanse her. This was a clear indication that the marriage was still subsisting despite a long period of separation.

**TONGA**

The similar view was given by a Tonga\textsuperscript{13} lady I interviewed. She said that marriage only ended when *ciko* was returned. When one spouse dies during marriage separation he or she is still regarded as a widow or widower and should be cleansed. The *ciko* consists of goats, hoes, and about three heads of cattle. It is believed that cattle were and are still the major form of *ciko* because cattle are so important and represent wealth and status among the Tonga people. Among the Tonga, if the woman dies before the final *ciko* is paid, then the balance becomes payable immediately and the woman will not be buried until payment is made\textsuperscript{14}. *Ciko* gives the husband a right to bury his wife’s body in his village. Even in a case where parties are divorced, as long as the *ciko* is not returned the man demands for burial rights of the woman’s body\textsuperscript{15}. This entails that if *ciko* is not returned to the husband, the marriage is still subsisting.

\textsuperscript{13} M. Chisonga UNZA 14:09:03
\textsuperscript{14} WLSA Research Project on Inheritance in Zambia 103
\textsuperscript{15} Ibid p 104
LOZI

From the research of WLSA\textsuperscript{16}, Mary Nakubiana, a widow who got married under the Lozi customary law in 1956 had this to say:

\begin{quote}
"I moved to my husband’s village on marriage in 1956. In 1974 he brought me back to my village after failing to find help following my leprosy illness. I moved to Lusaka after recovery where I met him again and we started living together again. In 1976 he abandoned me for the second time and he died in 1982 while we were living apart. Since his death nothing has been done to cleanse me”.
\end{quote}

It was observed in this scenario that Mary’s relatives had bought the coffin and helped with burial arrangements. However, although they were not formally divorced according to Lozi customary law requirements, where the man would have been required to inform the woman’s parents in writing that he had divorced their daughter, in the absence of such express provision, the marriage still subsisted.

BEMBA

Among the Bemba, payment of impango (bride wealth) seems to be the most important requirement of a valid marriage. The Bemba tradition tends to value the first marriage more as far as impango payment is concerned because it is assumed the woman is a virgin. There is often less fuss over subsequent marriages\textsuperscript{17}. The impact of death in a subsisting marriage separation seems to affect people positively or negatively.

\textsuperscript{16.} Ibid
\textsuperscript{17.} Ibid p 16
The following example of a Bemba customary law marriage seemed to have affected the widow positively. Regina\textsuperscript{18} was married according to Bemba customary law. The deceased paid \textit{impango} as per customary law requirement in 1969. Her marriage was unhappy because the husband liked having affairs with other women. In her own words she said:

"He used to have short marriages with other women whereby he would literally abandon me and the children until he got fed up. This happened from time to time until in 1985, I could stand it no more. I went to the local court and filed for divorce, but I was advised to wait, to give the marriage another chance in case he came to his senses. Also, my church, the Catholic Church refused to grant me a divorce because it is against the church. However, things went from bad to worse. In 1987 things just became impossible regarding my husband’s behaviour. I went to my church and explained to the Priest. Fellow Christians testified to the Priest that the situation was unbearable. Reluctantly, the Priest gave me a letter granting me a separation on condition that I do not remarry. Even the court finally granted us a divorce. We had five children together".

After the divorce, the man went to work in another area in Chinsali where he was transferred. He never married again. His health deteriorated, until he died. According to a court order, this woman was not a widow because they had divorced. But the community and deceased’s larger family still regarded her as a widow.

The family contended that she was the only woman they recognized as having been married to the deceased. The deceased went about with many women but never paid \textit{impango} in these marriages to symbolize marriage though he even had children in the process. Though she never regarded herself as widow, she was however, allowed to sit in the family council and played a bigger role in choosing an administrator\textsuperscript{19}.

\textsuperscript{18} Ibid p 201
\textsuperscript{19} Ibid p 202
This means that once a person pays *impango*, a marriage subsists though the couple is on separation for a long time. In some tribes, this has negative impact on a widow or widower in case of death. Therefore, there must be a provision in the law to regulate such instances. The Intestate Succession Act\textsuperscript{20} as well as the Zambian or African Customary Law have not provided for such eventualities adequately hence the need for this research to try and make some recommendations for easing of sufferings that parties go through when death strikes.

**LUNDA**

Marriage under the Lunda custom is essentially the same as the other customs discussed. The two gentlemen interviewed; Mr. Yikon’a Damson headmaster of Mwinilunga High School and Mr. James Kawang’u\textsuperscript{21} indicated that marriage in the Lunda custom had to meet three main important requirements.

- a) Consent from any elderly member or members from both the bride and groom
- b) The girl should be of age
- c) The payment of *nsewu* (dowry)

When these requirements are met a woman is taken to the man’s home by the *Ikong’u* (counsellor) and other elderly women who could be cousins or distant aunt. The following day they perform the act called *kukwatisa kumazhilu* (freedom to cook). After a week or so, a woman is taken to her parents’ village by the husband’s sister or brother. This is the act called *kufuntisha mpang’a*. This is a sign of acceptance. The two interviewees emphasized that, no woman worth her salt would accept to be taken without following this procedure.

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20. Cap 59 of the Laws of Zambia

32
Separation

If a woman goes to her parents without being chased by her husband, he can not follow her. If the marriage is respected; her relatives would usually take her back to her husband after inquiring what the problem was. They would also carry a token like beer if he drinks.

If the parents discover that it was the husband who was wrong by sending her to her parents, then his uncle, father or grandfather will go to plead with her parents for her return. The interviewees admitted that separation could take one or more years if the problem was big. They said that marriage in such a case subsisted as long as nsewu was not paid back. In an event where one spouse dies during the marriage separation, the remaining spouse is still regarded as a widow or widower and would be required to pay impepi (the head of a person) in money form or in those days, payment in kind. In such a case, all the procedures of cleansing have to be followed. They pointed out that Lunda custom does not allow sexual cleansing. But the process of cleansing in their case is quite agonizing. The way he or she is treated during cleansing depends on how she related with the in-laws during their marriage.

While it is true that surviving spouses always suffer at the death during mourning period and after burial of a spouse, it is worse if the couple was on separation, customary law seems to perpetuate the problem while the Intestate Success Act and other Acts like Matrimonial Causes Act seem to provide no cure for the problem. There is need to critically look at the Law pertaining to marriage seriously.

21. Interview with D. Yikon’a and J Kawang’u UNZA 8th October 2003
CHAPTER FOUR

THE IMPACT OF INTESTACY ON A SUBSISTING MARRIAGE SEPARATION

4.1 Introduction

This chapter looks at the impact that death has on the surviving spouse and children vis-a-vis the deceased's family and the status of step-children in such marriage. The main focus is on the law as regards property sharing and cleansing. The chapter also presents different case studies gathered from several research sites and interviews conducted with a number of people.

4.2 Property Settlement

This is the most contentious issue discovered from all the case studies drawn from all the research sites visited and interviews conducted. Two points were brought out:

(a) That the surviving spouse was not recognised as a widow and therefore did not deserve to have a share of property.

(b) That, the surviving spouse was recognised as a widow but that she did not deserve to have a share of property as the two had separated for a long period of time.

An interview with Annie Namumba speaking on behalf of her sisters and brothers, showed that separation in Zambian marriages does not only affect the couple but the immediate family as well.
Annie Namumba\(^1\) had this to say:

"Marriage is a gift from the almighty God and one must enjoy it in his or her life time. But with my late brother, all was in vain. He never enjoyed his marriage at all. He experienced torture, discouragements, unfaithfulness and disorder from his wife. Despite the pressure and problems, he still loved his wife and children and he did the best for them. During their marriage mum and dad never visited them because she never allowed her husband to give out anything to his relatives. After the difficulties and torture my brother went through over the years, he decided to send his wife to her parents. On leaving the home, she broke a lot of goods like Chinaware, microwave oven, 26"Sony colour television and many others and the case was reported to Woodlands Police station though my brother restrained them from arresting her. She insulted the husband in the presence of his relatives and went ahead to insult the family members he was keeping. Although she stayed with her parents, my brother was not at peace because of what was happening during their separation period. During the separation my brother got sick. While in hospital, she used to go and bother him to write a will and request for money which, my brother used to give. The separation took almost four years. My brother eventually died and this was the worst moment. We allowed her to come home and mourn but we never considered her as a widow traditionally. However, we asked her to get the property which belonged to the deceased which she did and decided on her own to give some to mum and dad. After four days of property sharing, dad was summoned to court for not considering her as a widow and for getting some of the property. The court ordered us to consider her as a widow. This did not satisfy her. Three days later dad was summoned by the Army where my brother was working and evicted us from the house but the court order saved us. She took dad to Victim Support Unit at Woodlands Police Station and YWCA (Young Women Christian Association) where we were ordered to surrender everything including the items we bought with our own money since they were in the matrimonial home. Despite having been given her the share of property on separation and the rest were broken by her, she still managed to get all the property my brother bought during the separation period. A year later my dad came for a memorial service but, unfortunately six days before the service, my dad died suddenly. During the funeral she never allowed the children to mourn their grandfather. She also never stepped a foot at the funeral. She also never attended her late husband's memorial service let alone the children. As I speak now, she has instructed the children not to visit us nor greet us when they meet us. She has even changed the names of the children from the names their late father gave them".

\(^1\) Interview with Annie Namumba of Nyumba Yanga, 5\(^{th}\) October 2003
This was the experience of a family member. There could be many such experiences elsewhere.

One other interview was with a widow of Lusaka. She had this to say:

"My husband and I married under customary law. He paid four cattle as dowry. I found him with four children. I wouldn’t say that we were on separation as such because when he left for the United States of America, he left me in control of all the businesses. Problems started when he died whilst in the U.S.A. When his brother in U.S.A sent a message that he had died, the brothers here in Zambia refused that I should travel for burial in America as a widow to allow me witness my late husband’s burial. They also refused to bring the body for burial in Zambia but, we had enough money to do so. When the brother in the U.S.A sent the death certificate, I discovered that it showed single marital status. Upon this, my brother in-laws here in Zambia refused to recognise me as widow and decided to evict me from the farm where I was living. I took the matter to Police Victim Support Unit who ordered them to allow me stay at the farm. They never allowed me to say anything at the family gatherings. The third born brother shifted into our matrimonial home with his family from the village in Chipata. The problem was compounded by my having no children with the late. I haven’t been cleansed up to date. They even got some property from our matrimonial home despite the order from Police. As we speak now the matter is not yet resolved and so I have just decided to move out of our home to somewhere else I can have peace. They have told me that the property is for the children but they are the ones getting the property one by one and yet I have no problem with my step-children though they are also being influenced to turn against me. They appointed the first born to be the administrator but he does not live in Zambia at the moment."

Arising from this, you notice that the law is not adequate to offer relief to such widows. One wonders how relatives can register one to be single and yet he has left a wife just because there was no proof of a marriage certificate and yet lobola was paid which is the major requirement of a valid marriage. The provisions of the Intestate Succession Act of 1989 seem not to be appreciated by most families. Not that they are not aware but they feel left out.

2. E. Mmembe Lusaka, 7th October 2003
This could be the reason why some widows in trying to protect themselves act wrongly and create suspicions as to the cause of death. It was sad to learn in one interview I had of what one widow had done on hearing that the husband had died.

The interviewee had this to say:

"My cousin had problems with his wife and decided to send her away. They did not divorce. They were living on the Copperbelt (Kitwe) his employers sent him to Lusaka for a course. He got ill and died suddenly. When the wife got the news of death, she left the village and went to their Riverside home and packed all the family chattels and hid them. This brought a lot of problems between her and the deceased’s family. Thank God that I came in and ruled that she be recognised as a widow and property given to her. She was however cautioned for hiding the property secretly before the family could gather for the funeral”.

These are some of the problems experienced during separation when death strikes. The instances cited above are just a sample collected. There could be many such problems. The cases from the local courts visited in Lusaka and YWCA showed the same trend. The following are some of the cases on property sharing as reported in local courts and YWCA.

In the case of *Rosemary Shamboko v Fridah Matolokoshi* the plaintiff alleged that her husband had died on 17th March 2002. She stayed for three months without appointing any administrator but the defendant went and collected three months salary from her late husband’s work place without her consent. When she asked about the money the defendant denied having taken the money. In defence the defendant said that the money was used at the funeral and the widow (plaintiff) was not present at the funeral and refused to be cleansed.

3. Interview with Collins Lundah, Lusaka 17/1903
4. Lusaka Local Court case No. 2146/03
The court held that the widow should accompany who ever would be appointed administrator to the bank and collect the money.

In this case, the absence of the widow at the funeral was reason enough not to recognise her as a widow. It was also worsened by her refusal to be cleansed. In the case reported on 1st August 2003 at YWCA*, the couple was married for 6 years, they were on separation for 8 years. The husband died in August 2002. The sister to the deceased was appointed administrator in Lundazi Local Court. The deceased was working for the Office of the President in Petauke at a time of his death while the widow lived in Lusaka. They had two children aged 4 and 8. When the husband died, the family of the deceased husband refused to recognise the surviving spouse as widow because of the long period they had lived on separation. Her claim was for the share of property. In this case no divorce proceedings were done and yet she was denied a share of property because of the long period of separation.

In another related case of Barbara Kashumba v Joyce Simukolwa⁵, the couple separated due to many problems they had gone through. During separation, the widow wanted her husband to sell the house and share the money. The deceased did not sell the house. Later, the husband got sick and died. The mother of the deceased suffered a great deal during the illness but the plaintiff, despite the husband’s ill health managed to sue him asking the court to compel him to sell the house. When he could not come to court due to illness, she told the court that he was just fine and he was cited for contempt.

* The writer was asked to withhold the names of the parties in citing the cases
5. Matero II ‘A’ Local Court case No. 803/03
It shocked the court when he was brought on a stretcher. When he died, she brought an action against her mother in-law claiming ownership of the house. The court ordered that the widow should go back to the house she was living in with her late husband until an administrator was appointed.

The law in such cases only looks at what the status quo at the time is. It does not matter how the two parties would relate to one another as they live in the same house. In such a case one would expect that such people could not live together especially that they were already living apart. How then could they be forced to live under one roof?

4.3 CLEANSING*

Threats and fears based on other supernatural beliefs also inhibit individual members of the family, especially surviving spouses, from enforcing their rights under the new laws. In Zambia, Cibinde (spirit) is one of the most feared conditions in the supernatural world of beliefs associated with the death of a spouse. Cibinde or Kibanda in Kikaonde is according to Himonga a condition under which a widow or widower is believed to carry around the spirit of a dead spouse if she or he has not undergone the rite of purification. This rite is performed by the deceased spouse’s relatives. The condition of Cibinde has implications for remarriage and sexual associations of the afflicted person. The afflicted person may not remarry or have sex with another person because the evil spirit of his or her deceased spouse may harm his or her new spouse or sexual partner, by causing him or her serious illness or death.

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* The terms purification, purify are sometimes used in place of cleansing or cleanse in some documents
This attachment to cleansing brings about a lot of agonising moments to the surviving spouse and cases have been brought to courts for cleansing declarations. In the case of Harrie Musonda v Ronald Masambo the plaintiff alleged that the defendant had refused to purify her according to customary law. The brief facts were that, the plaintiff had moved out of her husband’s home in 2001 and only returned during the funeral in 2003. She refused to be purified after the funeral. But the plaintiff contended that the defendant had refused to purify her because all they knew was that the marriage had already come to an end. The court ordered the defendant to purify the plaintiff by 12th September 2003.

In the related case of Catherine Ter bo v Titus Njovu the plaintiff contended that after the death of her husband she had not been traditionally cleansed and as a result she had fallen sick. The court upheld the claim on the ground that the defendant bring a relative to the deceased to cleanse the plaintiff. In the Kang’ombe case, the defendant refused to purify the plaintiff because the deceased was just a boy friend though they had 3 children. But the plaintiff contended that the marriage was subsisting despite the fact that they had failed to reconcile their differences.

In these cases widows or widowers suffer at the hands of their in-laws because of the belief in evil spirits afflicting them and can inflict sacrifice their rights for such practices.

7. Ibid
8. Lusaka Local Court 1st Division case No. 2078/03
9. Lusaka Local 1st Division case No. 2110/03
10. Leodadia Kang’ombe v Florence Musumba Lusaka Local case No. 2586/03
   • In Kaonde custom the cleansing may take the form of sexual intercourse with the deceased’s male relative or vice versa (now it is being discouraged because of HIV/AIDS)
The table below shows a sample of cases gathered in three different places, the Lusaka Local Court ‘A’ Matero II ‘A’ Local Court and YWCA. Data analysis in Police Victim Support Units was found not to be well documented as all cases concerning property sharing were classified under one title “Depriving”. While the Police Officers interviewed admitted that cases of marriage separation were reported, they said that the occurrence books had no provision of stating such facts. They only indicated the actual offences on which offenders could be arrested.

**TABLE 1 CASES ARISING FROM DEATH DURING MARRIAGE SEPARATION**

<table>
<thead>
<tr>
<th>ALLEGATIONS</th>
<th>BOMA ‘A’ COURT LUSAKA, 2003</th>
<th>MATERO II ‘A’ 2003</th>
<th>YWCA 2002/03</th>
</tr>
</thead>
<tbody>
<tr>
<td>Property sharing (grabbing)</td>
<td>03</td>
<td>03</td>
<td>07</td>
</tr>
<tr>
<td>Cleansing</td>
<td>03</td>
<td>02</td>
<td>01</td>
</tr>
<tr>
<td>Total</td>
<td>06</td>
<td>05</td>
<td>08</td>
</tr>
</tbody>
</table>

**NB:** Some cases had both claims of property sharing and cleansing

The tables 1 and 2 capture the prevalence of these cases. Due to lack of space it was not possible to produce the cases in detail.
TABLE 2: A SAMPLE OF CASES FROM THE THREE RESEARCH SITES ON THE IMPACT OF DEATH IN A SUBSISTING MARRIAGE SEPARATION

<table>
<thead>
<tr>
<th>RESEARCH SITE</th>
<th>CASE RECORD</th>
<th>OFFENCE ALLEGED</th>
</tr>
</thead>
<tbody>
<tr>
<td>YWCA</td>
<td>15/03/02</td>
<td>Property Sharing</td>
</tr>
<tr>
<td></td>
<td>26/03/02</td>
<td>&quot;</td>
</tr>
<tr>
<td></td>
<td>30/05/02</td>
<td>&quot;</td>
</tr>
<tr>
<td></td>
<td>10/12/02</td>
<td>Cleansing</td>
</tr>
<tr>
<td></td>
<td>19/12/02</td>
<td>&quot;</td>
</tr>
<tr>
<td></td>
<td>05/05/03</td>
<td>Property sharing</td>
</tr>
<tr>
<td></td>
<td>01/08/03</td>
<td>&quot;</td>
</tr>
<tr>
<td></td>
<td>27/08/03</td>
<td>&quot;</td>
</tr>
<tr>
<td>Lusaka ‘A’ Local</td>
<td>2078/03</td>
<td>Cleansing</td>
</tr>
<tr>
<td>Court 1st Division</td>
<td>2110/03</td>
<td>Purification*</td>
</tr>
<tr>
<td>(Boma Court)</td>
<td>2146/03</td>
<td>Cleansing</td>
</tr>
<tr>
<td></td>
<td>P. Nkunko v H. Mwila</td>
<td>Property sharing</td>
</tr>
<tr>
<td>MATERO II ‘A’</td>
<td>303/03</td>
<td>Property sharing</td>
</tr>
<tr>
<td></td>
<td>541/03</td>
<td>Property sharing</td>
</tr>
<tr>
<td></td>
<td>541/03</td>
<td>Cleansing</td>
</tr>
<tr>
<td></td>
<td>803/03</td>
<td>Property sharing</td>
</tr>
<tr>
<td></td>
<td>803/03</td>
<td>Cleansing</td>
</tr>
</tbody>
</table>

4.4 THE STATUS OF STEP-CHILDREN

The state in which step-children find themselves is equally agonising. In *Roda Mwale & Lucky Mwale v Miriam Mumba*11 the defendant (widow) sold the family cars and bought a house in her name. She took all the house hold goods to her relatives leaving her step children with nothing. The deceased left a will which stated that the widow should look after the step children. In her defence, the widow said that her husband died of HIV/AIDS and that she was also HIV positive hence, she needed the share of property her husband left before she too died.

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11. Lusaka Local Court 1st Division case No. 2641/03
* Used interchangeably with cleansing in some local court cases
To the widow, the Will was not important. What was important was her life. And so she found it fit to take away the family chattels to herself leaving her step-children without a share, but section 90\textsuperscript{12} provides for the entitlement to the house for both surviving spouse and children.

It becomes extremely difficult for the step-children to have access to such a house. If the children were the widow’s and were step children to the deceased, there would be no problem because they would always be with their mother. The Act should have provided specifically for the step-children in such scenarios. It is very difficult for step-mothers to keep step-children in the same matrimonial home after the demise of their father.

Tenancy in common as provided for in section 9 (i) (a) of the Act\textsuperscript{13} is not practicable in the Zambian situation. The widow may wish to live in the house but, may not keep the step-children. In such a case children would not benefit. It is not always true that they should put the house on rent and share the money according to their entitlements. Either the widow or step-children may wish to live in the house, thus depriving the other of the benefit. The law provides that the surviving spouse shall have a life interest in the house which shall determine upon that spouse’s remarriage\textsuperscript{14}. This poses a problem in the event that she does not remarry and decides to stay in the house whilst the step-children are with their biological mother. These problems impact negatively on the surviving spouse and children hence the need for redress.

\textsuperscript{12} The Intestate Succession Act Cap 59
\textsuperscript{13} Ibid
\textsuperscript{14} The Intestate Succession Act
CHAPTER FIVE

DISCUSSION, CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

Marriage, as observed in this research is regarded as a union of not only two people, but two families. Thus, marriage should receive approval from both families otherwise it would not be recognized.

This essay has attempted to outline what constitutes a valid marriage, the types of separations and the impact that death has on the surviving beneficiaries through interviews and case studies from different research cites.

This chapter makes an evaluation of the research findings and, offers a critique of the Intestate Succession Act, 1989 and Customary Law. After concluding, five recommendations are made.

5.2 EVALUATION

It is obviously true that every research has set goals to be achieved. But there are some limitations in trying to achieve such goals. In this particular research the limitations were:-

a) Inadequate funding to undertake a research of such magnitude.

b) The inaccessibility to vital information in most institutions; and

c) The late commencement of the research due to the departure of the first supervisor.
Despite all these limitations, we remained focused to achieving the set goals and doing the research. The main aim was to critically look at the inadequacies of the Intestate Succession Act, 1989 and the existing Zambian customary law on the question of separation; and the consequences of death during a subsisting marriage separation.

The question in the final analysis is: with the advent of the Intestate Succession Act and the existing customary law here in recounted and examined, has the widow/widower’s life improved or has it worsened? Put more plainly, have the difficulties that the surviving spouses, children and family members go through lessened or worsened? The trend in institutions that are designed to offer relief have shown that the problem is enormous. It requires political will to redress. The problem is three-fold; it affects the surviving spouse, the step-children if the deceased is the their biological parent and the deceased’s parents or close relatives. When a spouse falls sick during the marriage separation, usually he or she is tended by close relatives whom the law has not given any protection. Take for example, the case of Barbara Kashumba v Joyce Simukolwa\(^1\) reported in the Matero II ‘A’ local court where a mother had tended her son in hospital until his death because the wife was separated from him, but was later dragged to court for property sharing and the court ordered that the widow should go back to the house she was living in with her late husband. Imagine the agony the mother would continue to go through. Can one say that the law has provided relief in such a case? Surely not. It is like the wounds have been opened. The Intestate Succession Act has not adequately provided for relief in matters of this nature.

\(^1\) Case No. 803/03
It could be a widow, widower or children, but the Act is helpless in the event that death occurs while the couple is on separation. The customary law has not solved the problem either. The continuous requirement of cleansing is repugnant to natural justice. No one should be tied to his or her aggressors in the name of tradition. And this is what this research has found.

5.3 CRITIQUE OF BOTH INTESTATE SUCCESSION ACT 1989, AND CUSTOMARY LAW

The contemporary issue over the Intestate Succession Act, 1989 is whether a parent who has carried the child in the womb for 8 to 9 months, nursed this same child up to 16 years, invested in his or her education perhaps up to University level. Finally when that child gets a job and accumulates wealth and dies, the law says, the parent must get nothing regarding family chattels and awards a parent or parents a 20% share only. And yet widow or widower only came to know the deceased when he or she was fully grown up and was perhaps self supporting. How can he or she be at par with a parent or even more when his or her 20% is combined with the children’s 50%. The law is not just.*

If this is the scenario, how about a situation where the couple was even on separation and each one went on a frolic of his or her own as though marriage never existed: These issues are beyond the scope of the present Intestate Succession Act, 1989. The Act’s sections five, six, seven, eight, nine, ten and eleven have not covered the problem of marriage separation and therefore leave many questions unanswered. The Act was intended to answer Zambian problems which it has only partially done.

*Here the parent is not talking about the boy child alone but a girl child too.

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The Act has provided for a polygamous marriage in section 10 which is a Customary Law issue without providing for the question of cleansing, an issue "imprisoning" many surviving spouses. Part of the preamble to this Act reads as follows:

"... and to provide for matters connected with or incidental to the foregoing".

This surely can not mean that cleansing is a matter connected with or incidental to the foregoing. We have seen in the cases that local courts have ordered cleansing to be done according to customary law. But Kaonde customary law requires sexual cleansing. Is this what the Act meant? Is sexual cleansing acceptable in the modern times? This is the weakness of the customary law in relation to the Act. When one critically looks at the contents of the Act, he notices that, though it is of universal application and tries to protect anyone aggrieved, in its context one quickly sees bias towards one particular group.

Little did the authors of its enactment know that the very group that they set out to protect would be disadvantaged. In the final analysis the Act has created problems for people who once sat and ate on the same table.

The customary law on the other hand seems not to be in conformity with the living law of the societies. It can be perceived as though it is codified and needs repealing. Customary Law should not be enforced by the belief in supernatural forces like cibinde (spirit) to force compliance, but should guide parties into unity and harmony. The research for the aforesaid has found both laws inadequate in providing relief on the subject under review.
Death during a subsisting marriage separation has impacted upon the surviving spouse, children and family members in a glaring way. The statutory provisions that were intended to guarantee some level of relief and protection to the affected parties have either been inadequate or non-existent. There seems to be a lacuna in the law of Intestate Succession. In all the cases studied in this essay, the essence of a separation agreement was not seen as a couple’s mutual consent to living apart and being their reciprocal release from their duty to cohabit, but an obligation to get rid of a mischief. And families came to believe so as, seen by some utterances in some cases. We think that separation provides a presumption that marriage has irretrievably broken down and so should result in divorce than having to wait for four to five years for one to make a decision. Death never promises any relief but misery and therefore people should not wait until it strikes, to make decisions. So far as reconciliation is concerned, we do not believe that parties who have gone through a forensic mill can likely become reconciled although that is not for us to state. If that is their wish no one has a right to put a stumbling block. If that is the wish of the parties, they should also be reminded to think of the option of a Will to save parties they leave behind the trouble of having to drag each other to court for property settlement. This essay has shown that there is indeed a problem that requires solutions. Stakeholders must rethink their stand on the issue and appreciate that there is a problem that needs their attention. There is a problem in the administration of this Act when death has occurred whilst the couple was intact and happy together. There are still cases of property sharing. There is no reason why any one should think it could be any better when the couple was on separation.
On the whole, it is very clear that the quest upon Government and other stake-holders is to revisit the law of succession and customary law and see if it is marching with times. We need political will to change the status quo.

5.5 RECOMMENDATIONS

In view of the above, we would make some recommendations for what we consider to be appropriate development of the law that will go towards ensuring that the many suffering widows, widowers, children and family members of the deceased go through are addressed.

The first recommendation that we would make is in the area of presumption of divorce.

The law has gone so far in ensuring that a person whose spouse has not been heard of or seen in seven years has been given a relief to petition for divorce as such a spouse is presumed dead. We do not see any reason why a spouse in a marriage that has broken down irretrievably should not be granted a divorce posthumously. That way, a surviving spouse would be released of the obligation of having to undergo mourning rituals and cleansing. The provision relating to this matter should be entrenched in our statute books. People should have a positive attitude on this matter because no one has been spared with the problem of property grabbing and cleansing. Everyone is affected in one way or the other.

Secondly, we recommend that the law on property division on separation be made mandatory. People should realise that everyone needs the comfort he or she is used to. Why should a wife for example be deprived of a television set, a fridge, a bed and sofa on separation just because she is chased from the matrimonial home by her husband? The husband should be prepared to part with some of that comfort to his wife.
The third recommendation is with respect to Wills. The law concerning Wills should be simplified to allow for simpler terms and drafting. There should also be a deliberate sensitisation campaign on the matter so that people are afforded a chance to distribute their chattels while they are alive other than having to leave it with an administrator who could be a source of conflict in the matter.

The fourth recommendation is with respect to step-children. The law concerning step-children should be revisited. Where the deceased has left children with their step father or mother, the law should be specific on how property should devolve than having to say for example, sections 8, 9\(^2\) (a) that

"8 Not withstanding section five where the Intestate in the case of a monogamous marriage is survived by a spouse or child or both, the spouse or child or both of them, as the case may be shall be entitled equally and absolutely to the personal chattels of the intestate.

9 (i) Notwithstanding section five where the estate includes a house the surviving spouse or child or both, shall be entitled to that house:

Provided that:

(a) where there is more than one surviving spouse or child or both they shall hold the house as tenants in common; and

(b) the surviving spouse shall have a life interest in that house which shall determine upon that spouse’s remarriage."

These provisions pose a problem where that surviving spouse has remained with the step children. There is no guarantee that peace will prevail in such a home. Either the children will suffer loss or the surviving spouse.
This was the cry of one interviewee widow of Lusaka in Chapter four who had no children with the deceased husband but remained with the step-children. She complained that the in-laws were saying that the farm house and the rest of the property were for children as she had a chance of remarriage because she was still young and had no children with the deceased husband. The law should specify whether a child or children are step-children or not because there are problems in that regard. The law should be more elaborate to avoid absurdity. It is our hope that these recommendations will add to the jurisprudence of this country.

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